No. 17-1672

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

ANDRE RALPH HAYMOND,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* STATES OF UTAH, ALABAMA, ARKANSAS, FLORIDA, GEORGIA, HAWAII, INDIANA, KANSAS, LOUISIANA, MICHIGAN, MONTANA, NEBRASKA, NEW JERSEY, OHIO, OKLAHOMA, SOUTH CAROLINA, TEXAS, WEST VIRGINIA, AND WYOMING SUPPORTING PETITIONER

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INTEREST OF *AMICI CURIAE*

The States house the vast majority of inmates in the country, most of whom will eventually be paroled.[1] The States also oversee the vast majority of offenders on some form of supervised release.[2] Because federal supervised release is "analogous" to State probation and parole, *Johnson v. United States*, 529 U.S. 694, 710-11 (2000), any strictures this Court places on federal revocation proceedings might later be read to constrain the States, too.

The States, however, have strong interests in preserving their "authority . . . over the administration of their criminal justice systems"—a power that "lies at the core of their sovereign status." *Oregon v. Ice*, 555 U.S. 160, 170 (2009). Those criminal justice systems include "varying types of proceedings," ranging from

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[1] *See* Bureau of Justice Statistics, *Reentry trends in the U.S.*, https://www.bjs.gov/content/reentry/releases.cfm#number (last visited Dec. 12, 2018) (as of early 2000s, 95% of State prisoners eventually released, nearly 80% paroled); *see also* Edward E. Rhine, Joan Petersilia, & Kevin R. Reitz, *The Future of Parole Release*, 46 Crime & Just. 279, 281 (2017) (explaining that most inmates are released on parole).

[2] As of 2016, States housed an estimated 6,262,000 inmates and supervised an estimated 4,518,100 probationers and parolees, compared to the Federal government's 320,000 inmates and 132,800 supervisees. Bureau of Justice Statistics, *Correctional Populations in the United States, 2016*, data tables, https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6226 and *Probation and Parole in the United States, 2016*, data tables, https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6188 (last visited Dec. 12, 2018). Using these numbers, the States house 95% of inmates and supervise 97% of persons on supervised release.

"criminal trials" to "probation or parole revocation hearings." *Gagnon v. Scarpelli*, 411 U.S. 778, 788-89 (1973). And "there are critical differences between" those varying proceedings that "both society and the probationer or parolee have stakes in preserving." *Id.* at 789.

Honoring those distinctions ensures that States retain flexibility when exercising their sovereign right to experiment with different approaches to supervision. That should produce more successful models to "prevent[] and deal[] with crime"—enterprises "much more the business of the States than . . . of the Federal government." *Patterson v. New York*, 432 U.S. 197, 201-02 (1977).

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici agree with the United States that the Tenth Circuit erroneously extended the jury trial right to post-sentencing proceedings, and that this Court should reverse. History, State sovereignty, and administrability concerns all counsel against extending the jury right to post-sentencing proceedings.

However this Court reaches that result, it should make clear that as long as the penalties at a revocation proceeding remain within the bounds of the jury verdict or plea, the States remain free to experiment with different approaches to supervision as they seek better ways to rehabilitate offenders while protecting the public. Since every State has probation and nearly every State has parole—both of which are analogous to supervised release—a contrary ruling could portend

significant consequences for every State's criminal justice system.

ARGUMENT

I. THIS COURT SHOULD NOT EXTEND THE JURY TRIAL RIGHT TO REVOCATION PROCEEDINGS.

The Tenth Circuit erroneously held that Congress violated the Sixth and Fifth Amendments by imposing a statutory term of reimprisonment for persons who commit new crimes while on supervised release. *Amici* agree with the United States that this Court should reverse. In doing so, the Court should emphasize that unless a post-sentencing proceeding imposes penalties exceeding the bounds of a plea or verdict, the States remain free to innovate in sentencing and revocation proceedings.

A. By design, offenders have fewer procedural protections after the criminal prosecution ends.

The Sixth Amendment protects an array of rights for "the accused" in "criminal prosecutions," including the right to an impartial jury. U.S. Const. amend. VI. The Fifth and Fourteenth Amendments' Due Process Clauses supplement this right with a requirement that the government establish guilt beyond a reasonable doubt, whether by trial or plea. *Apprendi v. New Jersey*, 530 U.S. 466, 476-77 (2000) (citing cases); *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004) (applying *Apprendi* to guilty pleas). Unless a defendant pleads guilty or waives a jury, jury findings beyond a reasonable doubt are required on all elements of an offense—that is, on facts that raise the maximum or minimum penalties. *Apprendi*, 530 U.S. at 490

(maximum incarceration); *Ring v. Arizona*, 536 U.S. 584, 592-93 (2002) (death eligibility); *Southern Union Co. v. United States*, 567 U.S. 343, 348-50 (2012) (maximum fines); *Alleyne v. United States*, 570 U.S. 99, 113 (2013) (minimum incarceration).

At sentencing, judges[3] have discretion to impose penalties within the bounds the judgment sets. The Court has "often noted that judges in this country have long exercised discretion . . . in imposing sentence *within the limits* in the individual case." *Apprendi*, 530 U.S. at 481; *see also Alleyne*, 570 U.S. at 116 (similar); *Ice*, 555 U.S. at 171 (holding judges have discretion to decide whether to run sentences consecutively or concurrently free of Sixth Amendment strictures).

In exercising that discretion, judges may find facts at a standard less than beyond a reasonable doubt and consider all manner of evidence that would not be admissible at trial. "[B]road sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment," even when a judge is "influenced by [any] matter shown in aggravation or mitigation." *Alleyne*, 570 U.S. at 116-17 (cleaned up). "For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant." *United States v. Booker*, 543 U.S. 220, 233 (2005); *see also Dillon v. United States*, 560 U.S.

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[3] A few states—Kentucky, Missouri, Oklahoma, and Texas—use sentencing juries as a general rule. *See* Arthur W. Campbell, *Law of Sentencing*, § 9:11 (Westlaw 2018) (citing statutes). Other states limit jury sentencing to capital cases. *Id.*; *see, e.g.*, Utah Code Ann. § 76-3-207.

817, 828-29 (2010) (holding that exercise of sentencing discretion does not violate Sixth Amendment); *Williams v. New York*, 337 U.S. 241, 246 (1949) ("[B]oth before and since the American colonies became a nation, courts . . . practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.").

Criminal sentences almost invariably include either an incarceration term or supervision in lieu of all or part of that term. Supervision may occur either up front (probation) or after serving some portion of a prison term (parole and supervised release), but always includes conditions. *See generally* 21A Am. Jur. 2d Criminal Law § 817, *Probation, generally; parole and suspension of sentence distinguished* (describing probation and parole). Common conditions include not committing further crimes, cooperating with a supervising officer, paying fines and restitution, and not using drugs or alcohol. *See, e.g.*, 18 U.S.C. § 3563 (federal probation conditions); Roger K. Warren, National Center for State Courts, *A Brief Memo on Probation Conditions*, https://bit.ly/2DnK85I (last visited Dec. 12, 2018) (listing common State probation conditions).

If a supervisee violates his conditional release, due process entitles him to notice of the allegations and evidence against him, a neutral decisionmaker, the right to be heard and to participate at a hearing, and a written decision. *Morrisey v. Brewer*, 408 U.S. 471, 489 (1972). In limited circumstances, he may also have a

due process right to counsel. *See Gagnon*, 411 U.S. at 790.

But "the full panoply of rights due a defendant" in a criminal trial does not apply in proceedings after conviction and sentencing for several reasons. *Morrisey*, 408 U.S. at 480. First, consider the Sixth Amendment's plain terms: After an offender is convicted, he is no longer "the accused." U.S. Const. amend. VI. And after he is sentenced, the proceeding is no longer a "criminal prosecution." *Id.* That's because the "imposition of sentence" marks "the end of the criminal prosecution." *Morrisey*, 408 U.S. at 480; *see also Minnesota v. Murphy*, 465 U.S. 420, 435 n.7 (1984) (same) *Gagnon*, 411 U.S. at 781 (same); *cf. Betterman v. Montana*, 136 S. Ct. 1609, 1613 (2016) (dividing criminal proceedings into three phases: charge, conviction, and sentencing).[4]

Second, release/revocation proceedings occur long after the State has met its heavy burden under the Fifth and Fourteenth Amendments to prove guilt beyond a reasonable doubt. Parolees long ago lost "the presumption of innocence," and their post-conviction

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[4] Though sanctions for violations of release terms are "part of the penalty for the initial offense," *Johnson*, 529 U.S. at 700, the proceedings are not part of the criminal prosecution. *See United States v. Carlton*, 442 F.3d 802, 807 (2d Cir. 2006) ("Because revocation proceedings generally have not been considered criminal prosecutions, they have not been subject to the procedural safeguards"); *cf. Gagnon*, 411 U.S. at 789 (distinguishing revocation proceedings from criminal trials). Even if the alleged violations are new criminal offenses that can be separately charged, they are not (in this setting) crimes, but only factors to determine whether to alter or revoke conditional release.

procedural safeguards "are not co-extensive with those enjoyed by a suspect" who has not yet been convicted. *United States v. Carlton*, 442 F.3d 802, 809 (2d Cir. 2006). Because the offender has already received "due process of law," the government may now execute his sentence—deprive him of "life, liberty, or property"—according to his crime (and consistent with the limited due process protections attendant to revocation proceedings).

Third, when an offender is on probation, parole, or supervised release, his liberty is conditional. "[T]hose who are allowed to leave prison early are subjected to specified conditions for the duration of their terms." *Morrisey*, 408 U.S. at 478. When an offender faces revocation of that release, he is deprived "not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special [] restrictions." *Id.* at 480; *United States v. Knights*, 534 U.S. 112, 119 (2001) (similar); *see also Carlton*, 442 F.3d at 810 (relying on conditional liberty interest to reject Sixth Amendment procedures at revocation hearings).

Release conditions can "restrict [an offender's] activities substantially beyond the ordinary restrictions imposed by law on an individual citizen." *Morrisey*, 408 U.S. at 478. This includes limiting constitutional rights, like the First Amendment right of association, 16A Am. Jur. 2d Constitutional Law § 593, *Probation and parole* (release conditions may include limits on who the supervisee may contact); the Fourth Amendment right against unreasonable search and seizure, *see Samson v. California*, 547 U.S. 843, 853 (2006) (holding governmental interests in supervising

convicts and protecting public "warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment"); the Fifth Amendment right against self-incrimination, *Minnesota v. Murphy*, 465 U.S. 420, 434 (1984) (holding Fifth Amendment privilege not self-executing as to probationers); and the Eighth Amendment right to bail, 8A Am. Jur. 2d Bail and Recognizance § 27, *Probation or parole violators* (citing cases for probation violators not being entitled to bail).

B. Probation and parole revocation have never involved juries, and should not do so now.

The Tenth Circuit held that 18 U.S.C. § 3583(k) violates the Fifth and Sixth Amendments under *Apprendi* and its progeny because "(1) it strips the sentencing judge of discretion to impose punishment within the statutorily prescribed range," and "(2) it imposes heightened punishment . . . based, not on [the] original crimes of conviction, but on new conduct for which they have not been convicted by a jury beyond a reasonable doubt, and for which they may be separately charged, convicted, and punished." Pet. App. 15a.

Amici agree with the United States that this Court should reverse. Whatever reasoning the Court adopts to do so, however, should not place the constitutional "straitjacket[]" of a post-conviction sanctions jury on State criminal justice systems. *Ice*, 555 U.S. at 171. To be sure, *amici* do not quarrel with the suggestion that the States and the Federal government retain sovereign discretion to convene sanctions juries by legislative mandate. But if the Court were to hold that

the Constitution requires the Federal government to empanel a sanctions jury before revoking supervised release—and later that holding were extended to a State's revoking probation or parole—it could hamper State efforts to innovate in probation and parole sanctions.

In deciding whether "impelling reason[s]" exist to "straightjacket[]" State criminal justice systems with procedures such as sanctions juries, the Court considers (1) historical practice, (2) respect for State sovereignty, and (3) administrability. *Id.* at 168, 171. All three counsel against extending the jury trial right to revocation proceedings.

1. History debunks the notion that juries play any role in revocation proceedings. *Apprendi* held that the Constitution requires jury findings on each element of an offense because that was a "longstanding common-law practice." *Ice*, 555 U.S. at 167. Preserving "the jury's historic role as a bulwark between the State and the accused *at the trial* for an alleged offense" was the "animating principle" behind the Sixth Amendment jury right. *Id.* at 168 (emphasis added). And as shown, judges—not juries—have traditionally exercised broad discretionary power at sentencing.

By contrast, conditional release as currently practiced post-dates adoption of the Fifth and Sixth

Amendments.[5] To the extent that parole (and later probation) became common-law practices after the adoption of the Bill of Rights, they have been a matter of executive and judicial clemency, with some legislative participation.

Parole was born in the mid-1800s in Norfolk Island, Australia. Beth Schwartzapfel, "Parole Boards: Problems and Promise," *Federal Sentencing Reporter*, vol. 28 no. 2, 80 (Dec. 2015). Warden Alexander Manconochie broke from the tradition of "discipline by brute force" and sought instead to make convicts into "gentlemen." *Id.* A prisoner's behavior earned or lost him "marks"; with enough good behavior, he could earn sufficient marks to buy his freedom. *Id.* This rehabilitative model started to overtake the retributive model in several European countries, and came to the United States in the late nineteenth and early twentieth centuries. *Id.* "By 1927, almost every U.S. state had [such] a [] system in place," with parole

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[5] Clemency existed, but was not exercised by juries. *See* Note, James N. Jorgensen, *Federal Executive Clemency Power: The President's Prerogative to Escape Accountability*, 27 U. Rich. L. Rev. 345, 348-52 (Winter 1993) (discussing history of pardon power). At common law in Great Britain, pardons had been granted at various times by Parliament, the crown, the church, the nobility, and the feudal courts. *Id.* at 350 & n.35. In the United States, the Framers vested the pardon power exclusively with the President. *See* U.S. Const. art. II, § 2.

What power juries did have to grant relief appears to have been limited to the verdict itself via nullification. *See generally* William H. Blackstone 3 Commentaries on the Laws of England, 238-29 (W.L. Dean 1846) (discussing "pious perjury" of jury acquittals despite strong evidence of guilt). By its nature, this cannot be exercised post-verdict.

boards assessing a convict's readiness to re-enter society. *Id.*[6]

Legislatures have entrusted probation decisions to the judiciary, with no role for the jury. Some see the common law roots of probation in the "benefit of clergy," whereby men of the cloth charged with capital felonies were transferred from the King's Court to an ecclesiastical court. *See* Rollin N. Perkins & Ronald N. Boyce, *Criminal Law*, 2-3 (3d ed. 1982). Others see them in the efforts of men such as John Augustus, a Boston cobbler who "altruistically took it upon himself to intervene on behalf of 'common drunkards' and petty criminals" by posting bond for them, getting them released from prison, and helping them reform. Wayne A. Logan, *The Importance of Purpose in Probation Decision Making*, 7 Buff. Crim. L. Rev. 171, 174-75 (2003). Whatever probation's origins, it began formally in the United States when Massachusetts passed the first probation statute in 1878. *Id.* at 175. The idea eventually spread—by the early 1900s, most States gave judges authority to grant and supervise probation, and by the 1950s, that practice was universal. *Id.* at 175-78 & n.19. But whether the practice started in 1590 or 1950, the process has never involved jurors.

2. Respect for State sovereignty also weighs heavily against imposing any jury requirement on revocation hearings. "Beyond question, the authority of States over the administration of their criminal justice systems lies at the core of their sovereign status." *Ice*, 555 U.S. at 170. This Court has "long recognized the

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[6] Nearly all (44) States today have parole boards. Schwartzapfel at 80; *see also* Rhine et al. at 280.

role of the States as laboratories for devising solutions to difficult legal problems," and refuses to "diminish that role absent impelling reason to do so." *Id.* at 171. Indeed, this Court does "not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *Patterson*, 432 U.S. at 201-02.

Helping offenders to reform while also protecting public safety might be the most persistent and vexing criminal-law problem States face. To date, no one has figured out the "right" or "best" way to reintroduce offenders into society while minimizing recidivism. *See generally* Michael Tonry, *Sentencing in America, 1975-2025*, 42 Crime & Just. 141 (2013) (discussing past and current approaches to punishment and supervision). Each jurisdiction seeks to balance these interests well, and in its own way.

Imposing a jury requirement, however limited, at revocation hearings could affect State law in two ways. First, it could reduce the use of determinate sentencing. Under *Apprendi*, indeterminate sentencing schemes are less problematic than determinate schemes—such as those at issue in *Blakely* and *Booker*—because they essentially remove judicial factfinding from the equation. *See Blakely*, 542 U.S. at 308-09. Faced with the potential costs of a second, post-sentencing jury system, a State might abandon determinate sentencing simply because it is not worth the trouble—even if that State's experience shows it to

be more effective or otherwise politically preferable.[7] Indeed, even if the federal sentencing scheme in this case were characterized as a form of indeterminate sentencing, States would still have an incentive to change their schemes to mitigate the risk of jury involvement post-sentencing. Second, and relatedly, States would have an incentive to increase the top range for offenses—even if they did not think that a given offense warranted such a top—because it would restore judicial discretion without the costs of running a jury-revocation system.

3. Finally, a jury system for revocation proceedings would be difficult to administer. *See Ice*, 555 U.S. at 172; *cf. Morrisey*, 408 U.S. at 490 ("We have no thought to create an inflexible structure for parole revocation procedures. The few basic requirements set out above . . . should not impose a great burden on any State's parole system.").

There are nearly 4.5 million offenders on some form of State supervision. *See* Bureau of Justice Statistics, *Probation and Parole in the United States, 2016*, data tables, https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6188 (last visited Dec. 12, 2018) (4,405,400 total State supervision population). Recidivism rates for offenders stand at about 67% within 3 years. *See* Bureau of Justice Statistics, *Reentry Trends in the U.S.*, https://www.bjs.gov/content/reentry/recidivism.cfm (last

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[7] As of 2015, 17 states and the District of Colombia had primarily determinate sentencing schemes. National Conference of State Legislatures, *Making Sense of Sentencing: State Systems and Policies* (June 2015) at 4-5, available at http://www.ncsl.org/documents/cj/sentencing.pdf (last visited Dec. 12, 2018).

visited Dec. 12, 2018) (as of 2014, "over two thirds of released prisoners were rearrested within three years"). Based on new arrests alone, the States likely hold *millions* of revocation proceedings each year. And this does not account for the many hearings based on non-criminal violations, such as failure to pay restitution. *See, e.g., Bearden v. Georgia*, 461 U.S. 660 (1983).

If the Court holds that the Constitution requires juries to decide a portion of those cases, the number of jury revocation proceedings could outstrip the number of criminal trials—by an order of magnitude or more.[8] That would make juries more commonly used *after* criminal trials than *in* them. Though *amici* were not able to find good data quantifying the costs of jury proceedings, it is certainly substantial. Adding more to that total cost (by requiring sanctions juries) could be more than State fiscs could bear. At a minimum, it would eviscerate the States' "overwhelming interest in being able to return the [convicted] individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole." *Morrisey*, 408 U.S. at 483.

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[8] As of 2007, the States collectively conducted nearly 150,000 jury trials annually. *See* Hon. Gregory E. Mize, Paula Hannaford-Agor, & Nicole L. Waters, *The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report*, 7, (2007), available at https://bit.ly/2TjKD6r (last visited Dec. 12, 2018).

CONCLUSION

This Court has long maintained—correctly—that Sixth Amendment rights do not apply in post-sentencing proceedings. For historical, sovereign, and practical reasons, this Court should adhere to those cases and not import those rights where they "do not belong." *United States v. Work*, 409 F.3d 484, 486 (1st Cir. 2005). This Court should reverse.

Respectfully submitted.

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